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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

CLARENCE STUDEMEYER,
Petitioner,

v.

JOHN W. MACY, JR., Chairman, U. S. Civil Service Commission; ROBERT E. HAMPTON, Member, U. S. Civil Service Commission; LUDWIG J. ANDOLSEK, Member, U. S. Civil Service Commission

and

EUGENE M. ZUCKERT, Secretary of the Air Forces, of the United States, Washington, D. C.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on April 12, 1965.

CITATIONS TO OPINIONS BELOW

The Opinion of the Circuit Court in No. 18,770 is printed in Appendix hereto, infra pp. 15-16. The earlier

Opinion of the Circuit Court in this case No. 17,464 is printed in Appendix infra pp. 12-14 and is reported in 320 F.2d 797.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 12, 1965, infra p. 17. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Whether Williams v. Zuckert, 371 U.S. 531, 372 U.S. 765, is to be construed as establishing a fixed arbitrary pattern which must be followed strictly before the failure of a U. S. government agency to produce witnesses for examination when requested by an employee in a discharge case under Sec. 14 of the Veterans' Preference Act vitiates the discharge,

OR, IN THE ALTERNATIVE,

Whether the Williams case is to be construed by giving the words their ordinary meaning so that the discharge of an employee will be vitiated if the agency is informed well in advance of a Civil Service Commission hearing of the names of specific witnesses and fails to produce the witnesses all of whom are under its control particularly where the ex parte affidavits of the witnesses are relied on by the Commission and where the record shows that the employee unsuccessfully sought the presence of the witnesses by direct approach before submitting a formal request to the agency.

STATEMENT

Clarence Studemeyer, the Petitioner, Foreman of the Plumbing Shop at Charleston Air Force Base (S.C.) was discharged after many years' employment with the United

States government for allegedly building a water-cooler for the shop personnel without authorization. Petitioner exhausted his administrative appeals to the Civil Service Commission under Sec. 14 of the Veterans Preference Act of 1944. Whereupon Petitioner sought relief in the District Court.

The District Court denied Studemeyer's plea for declaratory judgment and equitable relief, and he appealed to the U. S. Court of Appeals for the District of Columbia Circuit. This was case No. 17,464.

At the time of appeal in case No. 17,464, the law of the Circuit did not recognize an employee's right to examine witnesses in Sec. 14 Hearings. The United States Court of Appeals for the District of Columbia Circuit had in two cases, Williams v. Zuckert, 296 F.2d 416 (1961) and Deving v. Campbell, 194 F.2d 876, cert. den. 344 U.S. 826 (1952), held that it was not error for an agency to deny employees the right of examination of witnesses at Civil Service hearings in discharge cases under Sec. 14 of the Veterans' Preference Act and the pertinent regulations.

Under this state of the law of this Circuit, the District Court when this case was first before it ignored petitioner's showing that his request for witnesses had been ignored.[1] Furthermore, the issue of right of cross-examination was not initially briefed on petitioner's first appeal

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[1] These facts were set forth in an affidavit in support of Motion for Summary Judgment (Appellant's Appendix, Case 17,464 R. 14, 15). Affiant says that the hearing held at Charleston, South Carolina, he requested that the following persons attend the hearing for the purpose of testifying in his behalf.

Lt. Louis L. Clipp
M/Sgt. Luther J. Bartlett
Walter A. Porter, A/1c
Charles P. Stancil, A/1c
Gary W. Stanfield, A/2c
Ollie B. Miller, A/1c
Kenneth H. Owen, A/1c
William J. Donovan, Civ.
John M. Dunning, Civ.
Harry P. Cousans, Lt.Col.
W. D. Henderson, S/Sgt.

to the Circuit Court. However, before that case could be argued this court made the determination in Williams v. Zuckert, 371 U.S. 531, that where a proper request was made for witnesses for a Section 14 hearing the failure to produce them would vitiate the discharge. A Supplemental brief was then filed by petitioner calling the Circuit Court's attention to Williams v. Zuckert, supra. It appearing in the record that a request to examine witnesses had been made and denied, the Court of Appeals followed this Court's lead in it reconsideration of the Williams case, and remanded the case to the District Court for a hearing using the identical language of this Court in Williams v. Zuckert, 372 U.S. 765 (infra pp. 12-13).

Upon remand the District Court refused to hold a hearing but considered defendants' motion for summary judgment. Petitioner also filed a motion for summary judgment stating the facts which were not disputed.[2] The District Court (Appendix No. 18,770 R. 5) found against the petitioner mainly on the ground that the letter petitioner had written listing names of eleven witnesses (footnote 1, supra) was directed to the Chief of Civilian Personnel and not directly to the Commander. Additional grounds were that the petitioner had not taken a formal exception to the Hearing Officer's denial of right of cross-examination, and that the complaint had not been amended.

Petitioner appealed to the Circuit Court and the District Court was affirmed. The Court of Appeals indicated great reliance on its introduction of a new rule, i.e., that after an employee requests witnesses and this

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[2] The District Court of the District of Columbia has a special rule providing a formal process for settling the facts to be considered on Motion for Summary Judgment. Under this rule, 9(h), the parties state the facts which they maintain are not in dispute. If the other party does not controvert these facts they become binding on the parties. Hence, petitioner's "Statement of Fact" is controlling.

request is refused the employee must take a further effort to explain to the agency the difficulty the employee is having in getting witnesses, otherwise, an employee loses his right to examine.

The Williams case, with a comparable if not identical fact situation, was tried during June 1965 in District Court with judgment for Williams in accordance with principles of this Court in Williams v. Zuckert, 371 U.S. 531, 372 U.S. 765. A direct conflict with the application of this Court's judgment in the Williams case and the petitioner's case now exists.

REASONS FOR GRANTING WRIT

The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. It has, through application, twisted the meaning of and misapplied this Court's statement of law relative to examination of witnesses set forth in Williams v. Zuckert, 371 U.S. 531, 372 U.S. 765. The effect is to frustrate the enjoyment of rights of confrontation and examination of witnesses in Hearings under Section 14 of the Veterans' Preference Act and the Civil Service Commission regulations. Furthermore, the Court of Appeals' decision in effect establishes a set of technical rules as conditions precedent for the exercise of employees' rights to examination contrary to the specific direction of this Court in the Williams' decisions, and finally directly ignores Rule 15 of the Federal Rules of Civil Procedure providing for amendment of pleadings by implied consent.

1. The facts in the case present a classic example of the use of ex parte affidavits of witnesses[3] which are specifically relied on by the Regional Director of the Civil

[3] Lodged with this Court are the original exhibits filed in the District Court. "Govt's. Exhibit No. 1-45" is a record of the Civil Service Commission as certified to the District Court.

Service Commission [4] while at the same time denying the employee the right of examination of the witnesses. A simple chronological listing of the undisputed facts submitted without challenge under local Rule 9(h) of District establishes this.

a) Sept. 29, 1960—Letter of Charges

b) Oct. & Nov. 1960—Air Force obtained ex parte affidavits from Owens, Porter, Miller, Stancil, Stanfield and Henderson, all military personnel.

c) Nov. 1, 1960—final decision of agency discharging petitioner as of Nov. 3, 1960, and instructing him to take up appeal problems with "Civilian Personnel Officer". (18,770 R. 2)

d) Oct. & Nov., 1960. Prior to Nov. 28, 1960 Petitioner sought out four of the witnesses to secure their attendance at a hearing, but they refused.

e) Nov. 28, 1960—Petitioner wrote to Taylor the Personnel Officer, Charleston Air Force Base and listed eleven names including witnesses who had refused to come. (18,770 R. 2)

f) Dec. 5, 1960—Taylor called Petitioner and said the witnesses would not be produced and that Petitioner must provide for them on his own. Petitioner then made no further effort.

g) Dec. 9, 1960—At a hearing before Examiner of Civil Service Commission in Charleston, S.C. Petitioner showed the examiner his written request to Taylor, and Taylor again orally refused (18,770 R. 2) in the presence of Commander Cousans. Whereupon the examiner stated he would refer the

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[4] In sustaining the discharge the Regional Director (Item 28 Gov. Exhibit 1-45, labelled "Previous Decision") relied on these and other affidavits, e.g., he found: "Airmen Kenneth H. Owens, Walter A. Porter, Jr., Ollie B. Miller, Charles P. Stencil and Gary W. Stanfield all testified as to the correctness of both of these charges * * * (Exhibit 18)". This testimony was by affidavit and the presence of these five, with others, was requested by petitioner in his letter of November 28, 1960, *supra* Footnote 1, (18770 R.2, 3) and denied by the agency.

matter as to its relevency to the Regional Director. Not one of the nine military personnel appeared at the hearing except Commander Cousans.

h) Petitioner covered three pages in appeal to the Commission's Board of Appeals and Review discussing failure to produce witnesses. Appeal was denied.[5]

These facts were stated by Petitioner under Rule 9(h) of the District Court as a basis for Motion for Summary Judgment. The Respondents did not contest the accuracy of these statements as required under Rule 9(h) so that as a matter of law the Court was bound to accept these facts or to require a formal trial and make findings.

The Court of Appeals and the District Court were completely blinded to the simple basic principle that after Williams v. Zuckert the Civil Service Commission could no longer consider ex parte affidavits adverse to an employee where the employee requested eleven days before a hearing that the agency provide the attendance of these witnesses who were "readily available and under its control". The agencies and the Courts are now required "to give meaning to the language contained in the regulations affording the opportunity - - - for cross-examination of witnesses." (Williams v. Zuckert, 371 U.S. 531, 372 U.S. 765) Not only was the request timely made but it was again made at the commencement of the Civil Service Hearing, acknowledged by the Air Force in the presence of the Commander, and again denied. (18,770 R. 2) Rather than accept and apply the basic principle, the District Court with the affirmance of the Court of Appeals attached its own set of technical and arbitrary requirements to be achieved before an employee may be permitted to enjoy the protection of the law and regulations.

2. The blunt question then is: *Did the Court in the Williams case decisions intend to require same strict formula of conduct by an employee to sustain his initial*

[5] This is admitted by Respondents Appendix, Case 18,770-Interrogation question and answer number five. (R. 11, 12)

burden of producing witnesses, or was the intention to require only a clear and timely communication?

The language of this Court is conformable only with the latter.

Contrary to this Court's holding in Williams, the Court of Appeals would have it that the Petitioner must go back to the Air Force during the short period between Dec. 5 and the Hearing on Dec. 9 and explain that the atmosphere at the base was not conducive to obtaining voluntary appearances of witnesses and repeat this request The Court of Appeals would also inject the requirement that an employee should ignore his instructions and direct a request formally to the Commander instead of the Commander's Personnel Director. Keeping in mind that the agency was alerted before the hearing, and that it knew it was using affidavits from the requested witnesses and that the request was renewed to the Examiner at the Hearing in the presence of the Commander, it requires a complete divorce from reality to assume as did the Court of Appeals and the District Court that Petitioner would have gotten his wish if he had only used the proper size and color paper or gone through some meaningless and hopeless gestures. In fact, this Court, with full cognizance of the facts of agency attitudes, provided in the William case for an alternative to meet anticipated resistance to cooperation by the agency in the matter of witnesses. This is the meaning of this Court's language when it states in Williams' order of remand "or, under the circumstances and without fault of his own, was justified in failing to make such attempt". So the answer is certain: he need not ask twice; he need not follow a particular form and communication need not take other than an ordinary means reasonably calculated to timely alert the agency.[6]

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[6] There is no suggestion made here by the Respondents throughout this entire proceeding that they didn't know of the request for witnesses. And it should be noted that in Williams the request was contained in an affidavit forwarded to Josephine Dillon, Personnel Office, Air Force, by the Hearing's Examiner.

Seldom has there existed upon agreed facts a more classic example of simple refused to act in conformity with a decision of the Supreme Court.

At opposite poles are the decisions in Williams and in petitioner's case. Yet the facts are nearly identical. In Williams, as here, the employee communciated, (through the Civil Service Hearing Examiner), with the Civilian Personnel Officer of the Air Force well in advance of the hearing. In both cases, the witnesses whether civil or military were under the control and direction of the Air Force. In petitioners case they were physically present in Charleston, South Carolina where the hearing took place and the agency had eleven days to arrange for the presence of the witnesses after receiving actual notice of the names of the witnesses and the purpose for which their presence was desired. There could be no clearer example of direct conflict between a decision of this Court and that of a Court of Appeals.

3. For a good many years the Courts have, through practice and by rule, considered complaints as amended to the extent that factual issues are raised and defended and considered. Rule 15(b) of the Rules of Civil Procedure provides:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. * * *"

The Courts have uniformly taken a position of liberal interpretation of pleadings, and where, as here, the parties have expressed or implicitly consented and where, as here. there is actual notice and opportunity to defend (which was exercised), the complaint is considered as amended. Kuhn v. Civil Aeronautics Board, 183 F.2d 639, 87 U.S. App. D.C. 130; Martin v. Chandis Securities, 128 F.2d 731; McHenry v. Ford Motor Co., 269 F.2d 18; Val Marine Corp. v. Costas, 256 F.2d 911.

The Court of Appeals was clearly in error in adopting the holding of the District Court that the petitioner was bound by his complaint and by ignoring the petitioner's letter of Nov. 28, 1960. This letter requesting the Air Force to produce eleven described witnesses (Appendix Case 18,770 R. 2, 3) was reflected in petitioner's affidavit in Summary Judgment proceedings at the first trial in District Court (Appendix Case 17,464 R. 14, 15). These facts were brought to the attention of the Court of Appeals in case 17,464 and are *recited by the Court* in justification of the order of remand (infra, pp. 12-13). In the District Court proceedings the Respondents, in request for admissions and interrogatories, asked repeated and detailed questions concerning the Nov. 28th request taking up the witnesses by name. (Appendix 18,770 R. 3, 4) The District Court in its opinion discusses at length the Nov. 28, 1960 request for the eleven witnesses. Under such circumstances it would be a flagrant abuse of the rules and of common justice to deny relief to petitioner and to hold him strictly to the exact wording of his complaint.[7] The Respondents have been fully aware of petitioner's de facto complaint that he was denied the right to examine the key witnesses who gave ex parte affidavits adverse to him. Respondents were not only aware, but vigorously defended on this issue. Hence, as a matter of law, the complaint was amended.

CONCLUSION

Admittedly, the petitioner pushed with vigor the question of denial of the right to examine witnesses after this Court's determination in the Williams case. Prior to that,

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[7] While the complaint, asking equitable relief, was ineptly drawn in that it did not accurately describe the missing witnesses, it did however raise the question of denial of the request to examine witnesses. (Sec. 9 and 11 of Complaint Case 17,464, Appendix to Appellant's brief R. 6, 7)

except for cases within the scope of Vitarelli v. Seaton, 359 U.S. 535, 544, 545, the law of the jurisdiction did not permit relief on that ground. Deving v. Campbell, 194 F.2d 876; Williams v. Zuckert, 296 F.2d 416 (1961). Hence, it would have been a useless gesture for petitioner to have pursued the point. However, once the law was settled it was only necessary for the petitioner to show that he had made a timely request, one that was clear as to time and place and as to which witnesses were desired. Many of the witnesses requested had been specifically referred to in the letter of charges. Most of them had given adverse affidavits to Respondents.

In Williams', after trial in June 1965 on facts even less compelling, he was granted judgment. Unless the Court of Appeals' decision is set aside, the belief, that the issue of right to examine witnesses in Section 14 cases had been settled, will be dissipated; endless confusion and litigation will ensue, and proper judicial processing requires that decisions of the Supreme Court be adhered to.

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17464

CLARENCE STUDEMEYER, APPELLANT

v.

JOHN W. MACY, JR., CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

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Decided July 5, 1963

Mr. Claude L. Dawson, with whom *Mr. Donald M. Murtha* was on the brief, for appellant.

Mr. Barry I. Fredericks, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney, *Frank Q. Nebeker* and *Robert B. Norris*, Assistant United States Attorneys, were on the brief for appellees.

Before FAHY, WASHINGTON and DANAHER, *Circuit Judges.*

PER CURIAM: Insofar as this case presents issues in common with those decided in *Woodrow Studemeyer* v. *Macy*, No. 17465, on June 26, 1963, it is controlled by the decision in that case. In view, however, of the additional question raised in the instant appeal separate consideration is warranted and has led us to obtain supplementary

memoranda from the parties in light of the Supreme Court's recent decision in *Williams* v. *Zuckert*, 372 U.S. 765 (1963). The question relates to appellant's letter to the civilian Personnel Officer of the Charleston Air Force Base, dated November 28, 1960, in connection with a hearing before the Fifth Regional Office of the Civil Service Commission on December 9, 1960. In this letter he requested that the officer have certain named personnel, from most of whom affidavits had been taken in the matter of appellant's discharge of November 1, 1960, attend the hearing. Appellant did not undertake to contact these persons wanted as witnesses; but certain Air Force regulations provide, in pertinent part,

> Official information will be made available for use in litigation, and military and civilian personnel will be permitted to testify concerning such information in its files if material and relevant to the litigation . . .[1] [and] [t]he Judge Advocate General, U.S.A.F., is responsible for . . . [a]uthorizing the release of Air Force information to be used in prospective and pending litigation.[2]

In light of *Williams* v. *Zuckert*, *supra*, we cannot say that appellant was clearly entitled to no relief in the District Court. For if in fact the Air Force authorities reserve the right to permit or forbid its military or civilian personnel to appear in such proceedings (which, it appears, may be included within the term "litigation"), anything which appellant might have done independently in addition to making the request might have been unavailing.

The case is remanded to the District Court with instructions "to hold a hearing and determine whether the petitioner, desiring the presence of witnesses at his hearing, either discharged his initial burden under the appli-

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[1] 32 C.F.R. § 804.403 (Supp. 1963).

[2] 32 C.F.R. § 804.404 (Supp. 1963).

cable regulations by making timely and sufficient attempt to obtain their presence or, under the circumstances and without fault of his own, was justified in failing to make such attempt, and, if so, whether proper and timely demand was made upon the Air Force so that it was required to produce such witnesses for cross-examination. Upon making such determination, the District Court shall thereupon enter such further order or judgment as may be appropriate." *Williams* v. *Zuckert, supra.*

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18770

CLARENCE STUDEMEYER, APPELLANT

v.

JOHN W. MACY, JR., CHAIRMAN, UNITED STATES CIVIL SERVICE COMMISSION, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

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Decided April 12, 1965

Mr. Donald M. Murtha, with whom *Mr. Claude L. Dawson* was on the brief, for appellant.

Mr. Robert B. Norris, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney, and *Frank Q. Nebeker*, Assistant United States Attorney, were on the brief, for appellees.

Before EDGERTON, *Senior Circuit Judge*, and FAHY and WRIGHT, *Circuit Judges*.

PER CURIAM: The appellant seeks to set aside his discharge from civilian employment with the Air Force. We remanded this case in *Studemeyer* v. *Macy*, 116 U.S.App. D.C. 75, 320 F. 2d 797 (1963). The District Court held a hearing and entered summary judgment for the defendants. *Studemeyer* v. *Macy*, 228 F. Supp. 411 (1964). The plaintiff appeals.

As the District Court points out, the witnesses who the complaint says were unavailable at the Civil Service hearing were in fact present, and the appellent did not inform the Air Force that certain other military personnel refused to appear at his request. We agree with the District Court that the appellant is entitled to no relief.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1964

No. 18,770

Civil 909-62

Filed April 12, 1965

Nathan J. Paulson
Clerk

CLARENCE STUDEMEYER, APPELLANT

v.

JOHN W. MACY, JR., CHAIRMAN, UNITED STATES CIVIL SERVICE COMMISSION, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

---

Before: EDGERTON, *Senior Circuit Judge*, and FAHY and WRIGHT, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: April 12, 1965